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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~1027.~~ 657

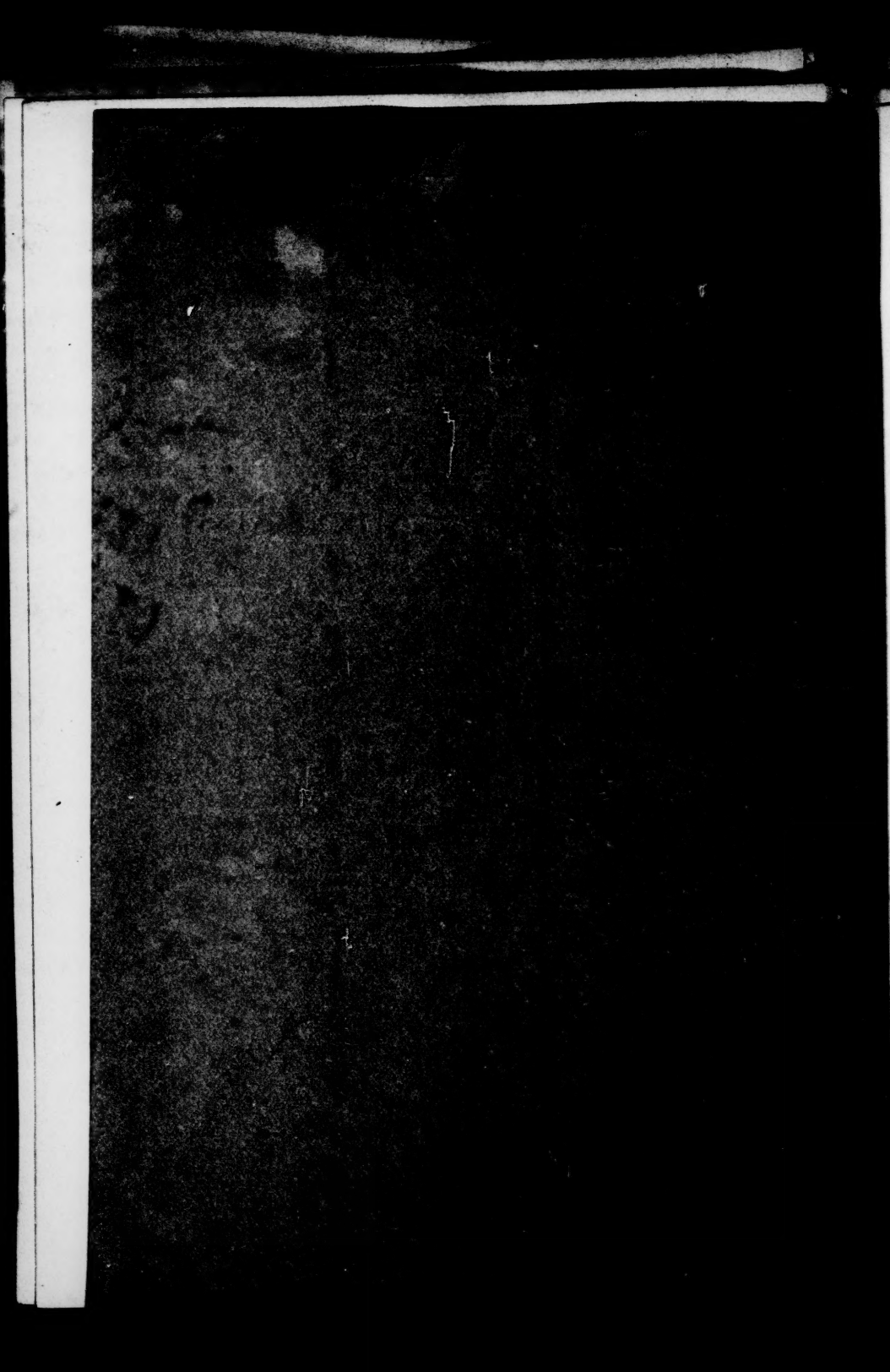
THE UNITED STATES, APPELLANT,

vs.

JOHN BOND.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1027.

THE UNITED STATES, APPELLANT,

vs.

JOHN BOND.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims of the United States.

JOHN BOND
vs.
THE UNITED STATES. } No. 14559.

I.—*Petition.*—*Filed February* 28, 1885.—*J. R.*

To the honorable judges of the Court of Claims:

The petition of John Bond sets forth and shows to wit:

That your petitioner enlisted as a private in the U. S. Marine Corps, at Marine Barracks, this city, on the 20th day of October, 1879, for five years, and served until the 3d day of August, 1883, when he was discharged by order of the Secretary of the Navy upon report of medical survey; that on the 1st day of May, 1881, he was rated 3d class musician; that he was a member of the Marine Band from the day of his enlistment to that of discharge; that as a member of said organization he performed on the Capitol grounds and President's grounds during the entire period served; that for said service he was, under section 1613 of the Revised Statutes of the United States, entitled to four dollars per month in
2 addition to the pay of his grade; that he was allowed the said extra compensation from May 1st, 1881, to August 3d, 1883; that there is still due him four dollars a month from the 29th day of October, 1879, to May 1st, 1881 (18 4-15) eighteen four-fifteenths months ($72.66⅔), seventy-two 66⅔ dollars.

Your petitioner further shows that he made written application to the Fourth Auditor, in June, 1884, for the said compensation and received a letter in reply, disallowing said claim.

Your petitioner prays as follows: That this honorable court adjudge and decree that the United States pay to him four dollars per month from the 29th day of October, 1879, to the 1st day of May, 1881.

JOHN BOND.

L. CABELL WILLIAMSON,
Attorney for petitioner, 490 *La. ave., Washington, D. C.*

I do solemnly swear that I have read the above petition by me subscribed, and know the contents thereof, and that facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN BOND.

Subscribed and sworn to before me this 24th day of February, A. D. 1885.

HOWARD O. EMMONS, [SEAL.]
Notary Public.

3 II.—*General traverse.*—*Filed Mar.* 16, 1885.

And now comes the Attorney-General, on behalf of the United States and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

An as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

4 III.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Claimant enlisted in the United States Marine Corps at the Marine Barracks, Washington, D. C., October 29, 1879, as a private, was assigned to duty with the Marine Band at the time of his enlistment, and remained and performed duty with the band as a private from that time until May 1, 1881, when he was rated as a musician. Prior to this last-mentioned date he was at no time rated as a musician, although playing in the band.

II.

Between the date of enlistment and May 1, 1881, the organization known as the Marine Band performed, under proper order, on the Capitol grounds and on the President's grounds. Prior to May 1, 1881, claimant received no additional compensation for such service.

CONCLUSION OF LAW.

Upon the foregoing facts the court find, as conclusion of law, that the claimant recover $72.27.

IV.—OPINION.

DAVIS, J., delivered the opinion of the court:

The claimant, enlisting as a private in the Marine Corps, was immediately attached to the band, in which he performed until May, 1881, when he was formally rated as a musician. Meantime he had played on the Capitol and White House grounds, whenever ordered, but as he has been allowed no extra compensation for this service he seeks now to recover it in this action.

Section 1596 describes the organization of the Marine Corps as consisting of a certain number of officers, non-commissioned officers, and privates, together with a drum major, a principal musician, thirty musicians, sixty drummers, and sixty fifers, while section 1613 directs that when the band is ordered to play on the Capitol or White House grounds extra compensation shall be given.

Counsel for defendants urge that the additional pay can be given only to those rated as musicians, and this has been the ruling of the accounting officers.

5 While the Marine Corps was established in 1775, and its band is one of the best known organizations of the character in the country, curiously this band has never had formal statutory recognition. Drums and fifes were provided for the Navy as long ago as 1794 (1 Stat. L., p. 350), while in 1798 "musicians," then understood to mean drummers and fifers, were given to the Marine Corps (1 Stat. L., p. 595). Other provisions similar in character have been made from time to time, but no mention is made of a musical organization until the enactment of the laws now condensed in section 1613 of the Revised Statutes. That section reads as follows:

"The marines who compose the corps of musicians known as the 'Marine Band' shall be entitled to receive at the rate of four dollars a month each in addition to their pay as non-commissioned officers, musicians, or privates of the Marine Corps, so long as they shall perform, by order of the Secretary of the Navy or other superior officer, on the Capitol grounds or the President's grounds."

The statute does not say that the members of the Marine Band shall receive extra compensation, for no such band is known to the law; but the pay is given to those "marines who compose the corps of musicians known as the Marine Band." The only other provision looking even indirectly to a musical organization is that of section 1596, allowing a drum major, a principal musician, thirty musicians, sixty drummers, and sixty fifers. If the extra pay had been intended for them only, what more easy than for Congress to have said so? But the phraseology of section 1613 is extremely peculiar. It is marked by a desire to do something more than this, and seems to recognize the fact that marines other than those rated as musicians performed in the band. It says, not the musicians, but the "marines who compose the organization known as the 'Marine Band,'" are to receive additional compensation; and this compensation is to be additional not to their pay as a drum major, or as a principal musician, or as musicians, but to the pay they receive either as non-commissioned officers, or as musicians, or as privates of the Marine Corps. It is said that all musicians in the corps are either non-commissioned officers or privates; but whatever force there might be in this argument is destroyed by the fact that "musicians" are expressly named as one of the class to receive the additional compensation.

The claimant was a "private of the Marine Corps." He was one of "the marines who compose[d] the organization known as the 'Marine Band.'" He performed on the Capitol grounds and on the President's grounds, under proper order, and thus falling within the phraseology of the statute, he should have received the additional pay.

Judgment for claimant in the sum of $72.27.

6 V.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 1st day of June, A. D. 1886, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said John Bond do have and recover of and from the United States the sum of seventy-two $\frac{27}{100}$ dollars ($72.27).

7 VI.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on 1st day of June, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 17th day of July, 1886, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBT. A. HOWARD, (D.)
Ass't Attorney-General.

Filed July 17, 1886.

AT CHAMBERS.

Allowed July 17, 1886.

WILLIAM A. RICHARDSON,
Chief Justice.

8 In the Court of Claims.

VII.

JOHN BOND
vs.
THE UNITED STATES. } No. 14559.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon; of the opinion of the court; of the final judgment of the court; of the application of defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 18th day of September, A. D. 1886.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

(Indorsement on cover:) No. 1027. The United States, appellant, vs. John Bond. Court of Claims. Filed September 27, 1886.

124-30

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
JOHN BOND.
} No. ~~1027~~. 657.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF ARGUMENT FOR THE UNITED STATES.

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In the Supreme Court of the United States

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
JOHN BOND.
No. ~~1027.~~ 657

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered by the Court of Claims in favor of John Bond against the United States on the 1st day of June, A. D. 1886, for $72.27.

October 29, 1879, Bond, the claimant in the court below, enlisted as a private in the United States Marine Corps at the Marine Barracks, Washington, D. C., and was thereupon assigned to duty with the Marine Band. He remained attached to the band, as a private, from that time until May 1, 1881. On the latter date he was rated as a third-class musician, and he served in that capacity in the Marine Band from May 1, 1881, until August 3,

1883, when he was discharged from the service upon the report of a medical board of survey.

During the period from October 29, 1879, to May 1, 1881, Bond played with the Marine Band when it performed from time to time on the Capitol Grounds and the President's Grounds under orders from the proper authorities. Prior to May 1, 1881, he received the pay of a private of the Marine Corps only, and received no additional pay for playing in the Marine Band.

In June, 1884, Bond made application to the Fourth Auditor in the Department of the Treasury for extra compensation, at the rate of $4 per month, for the period from October 29, 1879, to May 1, 1881, under the provision of section 1613 of the Revised Statutes of the United States; and the Auditor disallowed his claim. After the disallowance of his claim by the Auditor, Bond brought suit in the court below for the extra pay and obtained the judgment now appealed from.

It was stipulated and agreed by and between the claimant and defendant in the court below that claimant was not at any time prior to May 1, 1881, one of the thirty musicians provided for in section 1596 of the Revised Statutes.

The latter section reads as follows:

> SEC. 1596. The Marine Corps of the United States shall consist of one commandant with the rank of brigadier-general, one colonel, two lieutenant-colonels, four majors, one adjutant and inspector, one paymaster, one quartermaster, two assistant quartermasters, twenty captains, thirty first lieutenants, thirty second lieutenants, one sergeant-major, one quartermaster-

sergeant, one drum-major, one principal musician, two hundred sergeants, two hundred and twenty corporals, thirty musicians for a band, sixty drummers, sixty fifers, and twenty-five hundred privates. (Marginal notes, act of July 25, 1861, chap. 19, sec. 1, 12 Stat. L., 275; act March 2, 1867, chap. 174, sec. 7, 14 *Ib.*, 517.)

The only part of the act of 1867 referred to in the marginal notes as included in the above, is that giving the commandant the rank and pay of a brigadier-general of the army.

The act of July 25, 1861, referred to in same notes, is entitled "An act for the better organization of the Marine Corps." After the enacting clause follow these words:

> "That from and after the passage of this act the United States Marine Corps shall consist of the following officers, non-commissioned officers, musicians, and privates, viz, one colonel commandant [given the rank of brigadier-general by the act of March 2, 1867 "], etc.

Then follows the enumeration of the organization as compiled into section 1596, *supra*. We see by the original act from which this section was taken that among the enlisted men who are classed as "musicians" are the drummers and fifers; and that the marines who are non-commissioned officers or privates are different in grade and rank from musicians.

Section 1613 of the Revised Statutes, upon which this suit was brought in the court below, reads as follows:

> SEC. 1613. The marines who compose the corps of musicians known as the "Marine Band" shall be

> entitled to receive at the rate of four dollars a month, each, in addition to their pay, as non-commissioned officers, musicians or privates of the Marine Corps, so long as they shall perform, by order of the Secretary of the Navy, or other superior officer, on the Capitol Grounds or the President's Grounds.

This section purports to be a compilation from a clause in section 1 of the act of August 5, 1854, chap. 268 (10 Stat., 583, 586), and of section 5 of the act of August 18, 1856, chap. 162 (11 Stat., 102, 118).

The clause of the act of August 5, 1854 (*supra*), reads as follows:

> That the non-commissioned officers, musicians, and privates of the United States Marine Corps, shall be entitled to, and receive the same pay and bounty for re-enlisting as are now or may hereafter be allowed to the non-commissioned officers, musicians and privates in the infantry of the Army.

This clause is incorporated into section 1612 of the Revised Statutes immediately preceding section 1613, and no part of it had any necessary or proper relation with the subject-matter of the latter section.

Section 5 of the act of August 18, 1856 (*supra*), reads as follows:

> That the pay of the marines in the service of the United States who compose the corps of musicians known as the "Marine Band," stationed at the navy-yard in Washington City, be and the same is hereby increased at the rate of four dollars per month, commencing on the first of May last, and to continue as long as they shall perform, by order of the Secretary of the Navy or other superior officer, on the Capitol Grounds or the President's Grounds.

ASSIGNMENT OF ERRORS.

The court erred—

1. In their conclusion of law, based on the facts as found, that the claimant was entitled to recover $72.27 from the defendant.

2. In deciding on the facts stated in their findings that the claimant was from the date of his enlistment as a private in the Marine Corps until May 1, 1881, "one of the marines who compose[d] the organization known as the 'Marine Band.'"

3. In finding for the claimant and ordering, adjudging, and decreeing that he should have and receive from the United States the sum of $72.27.

BRIEF OF ARGUMENT FOR APPELLANTS.

The judgment appealed from in this case is for such an insignificant sum that an appeal would hardly have been taken were it not that questions of statutory exposition are involved which affect the status not only of the Marine Band but also of the Marine Corps.

In the court below it was held as a conclusion of law that the claimant, although only a regularly enlisted private, was, while in that grade, "one of 'the marines who compose[d] the organization known as the Marine Band,'" and the judgment rendered there rests on that conclusion of law. This was to decide, in effect, that privates may be detailed *ad libitum* to act as musicians in the band and thus deprive them of the military training and discipline contemplated for their branch of the service.

Appellants hold that the law does not permit a private

of the Marine Corps to act in the capacity of, or to be regarded as "one of the marines who compose the corps of musicians [or organization] known as the 'Marine Band.'" They further hold that if there is any practice under which privates or non-commissioned officers are taken from their place in the rank and file of the Marine Corps and required or permitted to perform in the Marine Band, such practice is not in accordance with law, is unlawful, and can not confer any right upon the marine so detailed to be paid the additional pay of four dollars a month allowed by section 1613 of the Revised Statutes.

Our position is, that the grant of this section is made only to the corps of musicians known to the law as the Marine Band; and that the parenthetical words "non-commissioned officers" and "privates" in the section are an inadvertence, a misdescription of the membership of the band; and hence that these words can have no effect to enlarge the membership of the band, as against the express provision in section 1596, which prescribes "thirty musicians for a band." (Bac. Max., 96, *reg.* 25; 59 *reg.*, 131; 1 Mackeld. Civ. Law, 169, § 175; Inst. 2, 20, 30; *Shore* v. *Wilson*, 9 Cl. & Fin., 555–567; Taylor, Law of Ev., §§ 1057–1092.)

As the issue particularly involves the status of the Marine Band, a musical organization which is not only a credit to but also a prominent feature of the Marine Corps, and which we would be glad to sustain to the extreme limit of the law, it will not be improper to seek in the statutes for the institution and history of that organization. To do this, however, it will be necessary to take a retro-

spective glance into the origin and history of the Marine Corps itself:

The Marine Corps is one of the oldest, if not the oldest military organization in the United States. Its first establishment dates back even beyond the time of the Confederation. By a resolution of the delegates of the United Colonies in Congress assembled, adopted November 10, 1775, two battalions of marines were authorized to be raised to serve during the war between Great Britain and the Colonies. They were to be distinguished by the names of the First and Second Battalions of American Marines. These marines were to be good seamen, acquainted with maritime affairs. The battalions were to contain an equal number of privates with other battalions, and to be commanded by one colonel, two lieutenant-colonels, two majors, and other officers as usual in other regiments. No mention was made of non-commissioned officers or musicians; but it may be presumed that there was authority for the appointment of the former and the enlistment of the latter for the entertainment of the battalions, or ship's crews, with the martial music of the Revolutionary period—fifes and drums.

The act to provide a naval armament, approved March 27, 1794 (1 Stat. L., 350), was the first to specially provide for marine music. The fourth section of that act allowed for each 44-gun ship, one lieutenant of marines, one sergeant, one corporal, "one drum, one fife," and fifty marines; and for each 36-gun ship, one lieutenant of marines, one sergeant, two corporals, "one drum, one fife," and forty

marines. This act was to expire when a peace should take place between the United States and the Regency of Algiers. It prescribed the pay of the commissioned and warrant officers of the Navy, and authorized the President to fix the pay of the petty officers, midshipmen, seamen, ordinary seamen, and marines.

The *Act of July* 1, 1797, (§§ 4, 6, 1 Stat. L., 523) to provide a naval armament, re-enacted most of the preceding act, and contained the same provisions in respect to fifes, drums, and privates. This act was to "continue in force for the term of one year, and from thence to the next session of Congress, and no longer." It was passed and approved during the first session of the Fifth Congress.

Before the end of the next session, namely, on July 11, 1798, another act was passed, entitled "An act for establishing and organizing a Marine Corps" (1 Stat. L., 594). The first section of the act prescribed the organization of the corps. It was to consist of certain commissioned officers, and "forty-eight sergeants, forty-eight corporals, thirty-two drums and fifes, and seven hundred and twenty privates," including the marines who had been enlisted or authorized to be raised for the naval armament. The corps so raised might be formed into as many companies or detachments as the President saw proper to direct, with a proper distribution of the non-commissioned officers and musicians to each company or detachment. The President still fixed the pay of the enlisted men. The second section made provision for putting marines upon shore duty, and, in such case, for the appointment of extra officers and non-commissioned officers; also for a "drum

and fife major" from the "music" of the "line;" *i. e.*, the drummers and fifers. Section three provided for details to be made by the President from the corps for service on frigates and other armed vessels and galleys. Section four required the officers and enlisted men to take the oath and subscribe to the Rules and Articles of War for the Army and Navy, according to the nature of the service in which they might be employed. Section six made the Marine Corps liable to do duty in the forts and garrisons of the United States and on the sea-coast, or upon any other duty on shore, as the President might direct.

Up to the year 1859 various acts and resolutions were passed touching the Marine Corps, a list of which may be found in the foot-note to *Ex parte William Brown* (5 Cr. C. C., 557), to most of which it is unnecessary to refer in this brief.

The act approved March 2, 1833 (4 Stat. L., 647) entitled "An act to improve the condition of the non-commissioned officers and privates of the Army and Marine Corps of the United States, and to prevent desertion," fixed the term of enlistment and pay of "the non-commissioned officers, musicians, and soldiers of said corps." The term of enlistment was made five years, and the monthly pay was fixed as follows, viz:

> To each sergeant-major and quartermaster-sergeant, $17; to the drum-major, fife-major, the orderly sergeants of posts, and first sergeants of guards at sea, $16 each; to all other sergeants, $13; to each corporal, $9; to each musician, $8; and to each private, $7.

Section 1 of this act made two general classes of the

enlisted men of the Marine Corps—"non-commissioned officers and soldiers." Then it subdivided the "soldiers" into two classes, "musicians and privates," the musicians being of a higher grade than the privates. It also fixed the pay of the enlisted men of the Marine Corps on a higher standard than that for the Army. For example, it fixed the pay of musicians and privates of the Army at $6 a month.

Although this act seems to have been the only one permanently fixing the pay of the enlisted men of the Marine Corps upon a statutory basis, no part of it has been incorporated into the Revised Statutes except section six, which reads as follows:

> That no person who has been convicted of any criminal offense shall be enlisted into the Army of the United States. (Rev. Stats., 1118, 1342, art. 3.)

The act of June 30, 1834, passed for the better organization of the "United States Marine Corps" (4 Stat. L., 712), maintained the same three classes of enlisted men, namely, non-commissioned officers, musicians, and privates. The non-commissioned officers authorized by it were one sergeant-major, one quartermaster-sergeant, one drum-major, one fife-major, eighty sergeants, eighty corporals. It also authorized thirty drummers, thirty fifers, and one thousand privates. The fifth section of this act prescribed the pay of the commissioned officers only. (Rev. Stat., 1612.) In regard to the enlisted men it had this provision: "And the non-commissioned officers, musicians, and privates shall be entitled to the same pay, rations, clothing, and allowances as they now receive;"

thus making their pay depend on the rate prescribed by the act of March 2, 1833, *supra*. (*United States* v. *Freeman*, 3 How., 556.)

The next act in relation to the organization of the Marine Corps was that of March 2, 1847 (9 Stat. L., 154). It provided for additional commissioned officers, sergeants, corporals, drummers, fifers, and privates; the pay of the enlisted men to continue as provided in the former law.

The present organization of the Marine Corps was made by the act of July 25, 1861 (12 Stat., 275; Rev. Stat., 1596). No change affecting the question in issue has since been made in respect of the organization of the corps.

The first mention made of the "Marine Band," *eo nomine*, in any statute is contained in section five of the general appropriation act of August 18, 1856 (11 Stat. L., 118). We have set forth this section in our statement of the case, and drawn attention to the manner in which it was introduced into section 1613 of the Revised Statutes. The present claim is based on its provisions. No mention of the "Marine Band" appears in any other act or resolution.

Congress knew in 1856 that there was a "Marine Band stationed at the navy-yard, Washington City." But in every act organizing or making appropriations to pay the Marine Corps, the enlisted men were, and still are, provided for as "non-commissioned officers, musicians, and privates." We thus see that the word "musician," in these laws, must be regarded as a generic term. It preeminently includes "drummers" and "fifers"; for these marines have always been designated as "musicians" by Congress.

We fail to find in the Marine Corps a band as a statutory organization prior to 1861. Whence its origin? Unquestionably it had some sanction in law before that time. It was not wholly illegitimate. It is admitted that there was a *quasi* recognition of a "band" in the Marine Corps in many acts making appropriations for the naval service. For example, in the *Act of March* 3, 1841 (5 Stat. L., 420), there is this item for the Marine Corps: "For military stores * * * flags, drums, fifes, and other instruments." This was for the calendar year 1841. Before that time the like item was for "military stores * * * drums, fifes, flags * * *" (*Ib.*, 29, 157, 400). In the words "and other instruments," contained in the act of 1841, there was a faint recognition of an organism in the Marine Corps, which afterwards grew into a "corps of musicians, known as the Marine Band" (Rev. Stat., § 1613). A reference to subsequent appropriation acts for the naval service will give some idea of the gradual development of that nebulous body into its present solid grandeur; and as well, also, a history of the struggle of the fife and drum for the maintenance of a musical status in the Marine Corps. From the year 1841 to 1844 there was an annual statutory provision for fifes and drums "and other instruments." Upon the sustenance thus provided for that period the band thrived; and in the act of March 3, 1845, it received its first statutory sanction in these words: "For military stores * * * flags, drums, fifes, and other instruments for the band" (5 Stat. L., 618).

From this enumeration of fifes, drums, and other instruments for the band, it would appear that the drum and

fife still maintained their ancient musical status. Indeed we may admit that they constituted by no means an inferior part of the band. But in the appropriation act for the year following a distinction was drawn—shall it be called invidious? The ear-piercing fife and spirit-stirring drum were disbanded, so to speak, or at least excluded from their time-honored position as instruments of music. Their ostracism was pronounced by Congress in these words: "drums, fifes, and instruments of music." This distinction seems to have been continued in the appropriation acts until 1859. We may assume that it was then abandoned or compromised, for we find in the appropriation act of that year an item for "drums, fifes and other instruments" (11 Stat. L., 315, 405). We find the same item in the same words in the appropriation acts for the four following fiscal years, the last of which was passed on March 3, 1863, about a year and seven months after the present existing organization of the Marine Corps, with its "thirty musicians for [a] band," went into effect (12 Stat. L., 81, 265, 148, 562, 816; *Ib.*, 275).

We find in various appropriations made for the Marine Corps such items as "oil," "candles," "gas," "forage," and even "keep of a horse," "brushes," "brooms," and "buckets;" but nowhere do we find any appropriation of extra pay for the band for playing on the Capitol grounds and President's grounds. The soldiers of this corps are seldom mounted as marines. Hence, such minute detail as that of "forage" and "keep of a horse," as we find on page 267 of the twelfth volume of the Statutes at

Large, would lead us to imply one of two things, namely; either that Congress regards section five of the act of August 18, 1856, which allowed the extra pay to the band, as obsolete, or else included the extra pay, from year to year, in the pay as fixed by the appropriation acts for non-commissioned officers, musicians, or privates; for, as already stated, there is no other statutory standard of pay for enlisted marines. If the former is the case, appellee had no legal claim; if the latter is the case, then he has been paid all that Congress intended to pay him.

It will be seen from this glance over the statutes affecting the organization of the Marine Corps, that when its band became a statutory body under section one of the act of July 25, 1861, its membership was confined to marines who were, and still must be, rated as "musicians"—"thirty musicians for [a] band."

A private or non-commissioned officer in the Marine Corps has never been classed or rated as a musician by any act or resolution of Congress, or by the military, marine, or naval authorities. The grade or rank of musician is *sui generis*. The fifer and the drummer are pre-eminently "musicians." Each has been given precedence over the private marine in all the acts of Congress. Formerly the statutory pay of a musician was $1 per month more than that for a private. Now, although Congress fixes the pay of drummers and fifers at the same rate they allow to privates, nevertheless the former are given rank next after non-commissioned officers. Thirty other musicians are allowed very much higher pay, namely, from $23 to $40 per month, as we shall show presently. Privates for the like period of service

are allowed $17 a month. Why this great difference of pay for "musicians" from $17 per month to $40 we fail to discover in any fixed law.

Upon the foregoing examination of the law we construct the following propositions:

I.

The act of July 25, 1861, (12 Stat. L., 275,) repealed any custom or regulation that permitted a private or non-commissioned officer to be assigned to duty as a member of the Marine Band; and unless its limitation for a band as incorporated into the Revised Statutes (§ 1596) has been repealed or other wise modified, it forbade and still prohibits the custom and the making of any such regulation. [Whether the "drum-major" and the "principal musician" of the Marine Corps are members of the Marine Band, or whether any of the "sixty drummers" and "sixty fifers" of that corps are a part of the Marine Band, are questions not material to the present case.]

II.

In order to be entitled to extra pay under section 1613 of the Revised Statutes, the marine must necessarily be a rated musician authorized by section 1596.

III.

It was an error to codify section five of the act of August 18, 1856 (11 Stat. L., 118)—which allowed the extra pay to the Marine Band—in the manner in which it

appears in section 1613 of the Revised Statutes. Nevertheless, a reasonable exposition of the whole chapter which contains this section will show an intention on the part of Congress to grant the extra pay only to "the marines who compose the corps of musicians known as the 'Marine Band.'" Section 1596, on the opposite page of the statutes, defines that corps as "thirty musicians for a band." It contemplates that, at most, statutory musicians only shall be members of the band. It further contemplates that each enlisted marine shall remain in and perform the duties of his grade, until he is promoted or discharged from the Corps.

The question presented in this appeal arises in respect to the meaning of sections 1596 and 1613 of the Revised Statutes. Is there any ambiguity in the latter section, or between it and section 1596?

Section 1596 is an incorporation of section one of the act of July 25, 1861, entitled "An act for the better organization of the Marine Corps" (12 Stat. L., 275). From and after the passage of that act the reorganized Marine Corps was certainly limited to the number of officers, non-commissioned officers, musicians, and privates therein set forth. Section 1596 contains the same enumeration of officers, non-commissioned officers, musicians, and privates. No greater number of officers, non-commissioned officers, musicians, and privates can be appointed to, or enlisted in, the Marine Corps. This section allows the following maximum number of musicians for that Corps, viz, "thirty musicians for a band, sixty drummers, sixty fifers." We

contend that section 1613 must be read with this section in order to ascertain who the marines are who compose the corps of musicians known as the "Marine Band."

When so read we find that the band is an organization composed of thirty marines, under the direction of one principal musician; and that it, perhaps, comprehends the drum-major, sixty fifers and sixty drummers.

We further find that none of these marines are officers, non-commissioned officers, or privates. They form a distinct body of musicians within the Marine Corps.

Are we confined to section 1613 for a description of the personnel of the Marine Band? Can not we refer to the first section of the chapter if there be any doubt in regard to it? Must we infer from the words "non-commissioned officers, musicians, or privates" in section 1613 that a non-commissioned officer or private may be mustered in either grade as a member of "the corps of musicians known as the Marine Band?" If we are so confined, and must so infer, then, the distinct limitation of "thirty [or any other] musicians for a band" in section 1596 was a vain thing on the part of Congress; and the Secretary of the Navy or the commandant of the Marine Corps may at any time change the whole marine force into a grand national orchestra or academy of music.

Is it reasonable to suppose that Congress intended to allow any officer such unlimited discretion? Yet if we admit the grant of discretion to put one private into the corps of musicians described in section 1596, we must also

admit that there is almost no limit to the proportions of this band.

We insist that there is no authority, expressed or implied in the law, for taking a private marine fronr his proper duty or training in the art of war and attaching him to the band, to learn or practice the trade or mystery of a musician. To do so would be contrary to the intention of Congress. That body appropriates money annually for the pay of a fixed number of officers, non-commissioned officers, musicians, and privates in the Marine Corps. The law requires these appropriations to be "applied solely to the objects for which they are respectively made, and for no other" (Rev. Stat., 3678). The duties of the privates are distinct from those of the musicians. The former have relation to military training and war, the latter do not pertain to arms. Each marine has his own peculiar place in the service, and Congress pays him to perform its duties. To take him away from these duties without lawful authority, and pay him for alien duty, is, in effect, paying out public money contrary to law (Rev. Stat., 3678). Each marine must remain in his own place. The place of the private is with his musket, that of the musicians (thirty) with their various instruments of music, the fifers with their fifes, and the drummers with their drums. *Ne sutor ultra crepidam.*

The force of this maxim seems to have been felt in the Marine Corps in respect to the very question at issue. We find in the annual report of the Secretary of the Navy to the President, made in the year 1877 (page 300), a letter from

the colonel-commandant of the Marine Corps to the Secretary which contains the following paragraph:

BAND.

An increase of the band of the Marine Corps is urgently recommended, as well as putting it upon a proper footing as regards classes and pay.

This band is properly a national band, being used for all official purposes in Washington.

The footing from which a change was desired was not stated by the commandant; but it was put very distinctly before Congress the same year by the Secretary of the Navy in his "estimates of expenditures" for the naval establishment, for the fiscal year ending June 30, 1877. The naval estimates are required by sections 3660–3666 of the Revised Statutes to be made annually and submitted to Congress through the Secretary of the Treasury (Rev. Stat., 3669, 3670, 3672), who addresses them to the Speaker of the House of Representatives. It will not be improper, therefore, to cite from the printed volumes, the estimate on behalf of the Marine Corps for that fiscal year, and one or two others, for the purpose of showing the footing of the Marine Band as understood by the proper authorities. The Secretary of the Navy, after estimating the sums required for the pay of the officers and non-commissioned officers of the Marine Corps, estimates as follows, for—

30 musicians of the band	$9,996
96 drummers and fifers	17,736
1,500 privates	270,000

Here we fail to find any "estimate" of extra pay for the musicians, much less other enlisted men, for playing

on the Capitol Grounds and President's Grounds. (Estimates of Appropriations, 1876–1877, for the fiscal year ending June 30, 1878, p. 92). Year after year, until the present day, the official call is for the pay of "thirty musicians of the band," or as it is sometimes abbreviated "thirty musicians." And each year there is no item of extra pay for the band. The Book of Estimates for the fiscal year ending June 30, 1880 (p. 89), is more specific than that for 1878. It sets forth the pay asked for each officer, non-commissioned officer, musician, drummer, fifer, and private.

The item for "musicians" is as follows: "Thirty musicians, 7 at $40, 8 at $26, and 15 at $23 per month, $9,996."

There has been no organic change in the corps of musicians known as the Marine Band since the writing of the above quoted paragraph from the letter of the commandant of the Marine Corps. As the defects alluded to therein may give some aid in solving the question at issue, we pray the permission of the court to state what these defects are. To enable us to do this clearly we would ask the court to take judicial notice of an authentic book of history which is published annually by the Department of the Navy and popularly known as the "Navy Register." (*United States* v. *Philbrick*, 120 U. S., 52.) We cite for present purposes the volume for the year 1879. From this history and the statutes we can ascertain the defects in the footing complained of as to *pay* and *class* of the Marine Band and the reason of the desire for an *increase* of its membership—a desire which would not have arisen had the commandant felt that he had the

power to assign to his corps of musicians an unlimited number of privates and non-commissioned officers.

From the statutes we discover that after their first term of service all the enlisted men of the Marine Corps who re-enlist in it are thereafter, and on each succeeding term of re-enlistment, placed on the same footing in regard to classes and pay as the enlisted men in the infantry of the Army of corresponding grades and terms of service. In support of this statement we cite section 1612 of the Revised Statutes, which reads as follows:

> SEC. 1612. The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army.
>
> (Marginal notes: Acts 30 June, 1834, c. 132, s. 5, v. 4, p. 713; 5 Aug., 1854, c. 268, s. 1, v. 10, p. 586.)

The act of June 30, 1834, section 5, referred to in these notes, as shown *supra*, fixed the pay of the Marine Corps officers, except the adjutant and inspector, at the infantry rates, but it merely continued the pay of the non-commissioned officers, musicians, and privates at the rates prescribed for enlisted marines in the *Act of March* 2, 1833 (4 Stat. L., 647), which are also fully set forth *supra*.

The first section of the act of August 5, 1854, also referred to in the above marginal notes, contains the various items of appropriations for the naval service for the fiscal year ending June 30, 1855, and also this clause:

> That the non-commissioned officers, musicians and privates of the United States Marine Corps, shall be

entitled to, and receive the same pay and bounty for re-enlisting as are now or may hereafter be allowed to the non-commissioned officers, musicians and privates in the infantry of the Army.

One of the effects of section 1612 is to class all the musicians of the Marine Corps with infantry musicians, after they re-enlist, and *then* to fix their pay at the infantry rates, namely, the same rates prescribed for privates. (Rev. Stats., 1280.) Of another effect we shall presently speak. In respect to the leader of the Marine Band, we are without any standard for his pay, because there is but one "leader of the band" in the Army. He is stationed at the Military Academy, and does not belong to the infantry. (Rev. Stat., 1094, 1111, 1278.) His pay is $75 per month. (Rev. Stat., 1278.) The best we can do for the leader of the Marine Band is to assimilate his position to that of the chief musician of a regiment of the Army, as his statutory title is "principal musician." But the pay of that grade in the Army is only $60 a month, and even then the drum-major of the corps might contest his right to the grade and its emoluments. (Rev. Stat., 1279.)

Here arises the question, What are the classes and rates of pay of the Marine Corps musicians during their first term of enlistment? We confess our inability to cite any fixed provision of law as an answer. We have carefully searched for an answer in the Revised Statutes, and in the laws passed since they went into effect, without finding one. But in this respect the musicians are in no worse a position than the other enlisted men of the Marine Corps.

How has this *casus omissus* been provided for? *Answer:* By special legislation in the annual appropria-

tion acts for the naval establishment. Congress in making appropriations for the pay of enlisted men of the Marine Corps seems to have taken legislative notice of and given temporary sanction to a "Pay Table" which is published annually in the Navy Register, and which, in respect to the classification and pay of musicians therein set forth, has no foundation in permanent legislation.

The appellee, having enlisted in 1879 as a private and been immediately assigned, as of that grade, to duty in the Marine Band, we cite the following table of pay from the Navy Register of that year, page 129, which reads as follows:

Pay table of non-commissioned officers, musicians, and privates of the United States Marine Corps

Grades.	First period of 5 years' service.	Second period of 5 years.	Third period of 5 years.	Fourth period of 5 years.	Fifth period of 5 years.
	Per month.	*Per month.*	*Per month.*	*Per month.*	*Per month.*
Sergeant-major	$23	$27	$28	$29	$30
Quartermaster-sergeant	23	27	28	29	30
Drum-major	22	26	27	28	29
First sergeant	22	26	27	28	29
Sergeant	17	21	22	23	24
Corporal	15	19	20	21	22
Drummers and fifers	13	17	18	19	20
Privates	13	17	18	19	20
Leader of the band	79	81	82	85	84
Musician, first class	38	40	41	42	43
Musician, second class	24	26	27	28	29
Musician, third class	21	23	24	25	26

All enlisted men, except musicians of the band, serving on a first period of five years' service, are entitled to one dollar per month for the third year, two dollars per month for the fourth year, and three dollars per month for the fifth year's service, in addition to the sums given in the first column above, which additional amounts are retained until expiration of service and paid only upon final settlement and *honorable* discharge.

One dollar per month is retained from all enlisted men (except the Marine Band) serving under a re-enlistment. This retained pay is not included in the above table, and is to be credited and paid only upon final settlement and *honorable* discharge from service.

Curiously enough, Congress made the appropriations for the musicians of the Marine Corps for the three fiscal years ending, respectively, on June 30, 1879, 1880, and 1881 (thus touching the very period of the present case), not upon the pay rates of the first column of the table, but on the rates for the second period of enlistment.

The appropriations for the so classified musicians for these fiscal years are as follows, namely:

For seven of the first class, at $40 per month	[$3,360.00
For eight of the second class, at $26 per month	2,496.00
For fifteen of the third class, at $23 per month	4,140.00]
Total for each fiscal year	9,996.00

(20 Stat., 56, 291; 21 Stat., 89.)

This is the only sanction we can find for putting musicians of the Marine Corps, of equal periods of enlistments, into different classes as to pay, or for making any distinction in respect of pay between these musicians and the more time-honored musicians of the corps—the drummers and fifers. Of course, so far as it goes, it is sufficient sanction.

The point we desire here to make is this: The utter absence in Navy circles, in the Marine Corps itself, and on the part of Congress of any recognition by estimates, tables, or appropriations of any right to assign non-commissioned officers or privates of the Marine Corps to perform with the band, much less the right to fix any liability upon the public Treasury to pay them extra compensation for so performing.

All the appropriation acts since 1861, when the Marine Corps was reorganized by Congress, are to the like effect

as the above. It is unnecessary to burden this brief with citations from them.

It is clear from these statutory, historical, and official sources of information, accepted and acted upon as they have been by Congress and the Executive branch of the Government, lo, these many years, that the marines who compose the corps of musicians known as the Marine Band can not be privates or non-commissioned officers. On the contrary, they are the "musicians" annually provided for by Congress, and the principal musician, or "leader of the band," as he is sometimes called in the appropriation acts.

The word "corps" in the first line of section 1613 is to be taken in its ordinary and general sense, as meaning, according to Webster's definition, "a body of men, especially a body of troops, an organized part or division of an army."

Hence, by the phrase, "the marines who compose the corps of musicians known as the Marine Band," we understand that an organized body of men is meant—a body of marines who form a part of the Marine Corps. How, and when organized? By Congress, by the Act of July 25, 1861, as incorporated into section 1596 of the Revised Statutes.

Read by itself, section 1613 would seem to imply that "the corps of musicians known as the Marine Band" might be composed of non-commissioned officers and privates as well as musicians. But we come by such reading to a conflict with the express words of section 1596, which prescribes "thirty musicians for a band," and the necessary implication that the band so organized in the law "for the bet-

ter organization of the Marine Corps" shall not include any non-commissioned officers or privates. We hold that the mention of "privates" and "non-commissioned officers" in section 1613 is a mere misdescription of the *personnel* of the band, and that it can have no more operation than such words in a deed or will. To hold otherwise is to raise a doubt as to the meaning of the language of the section. By regarding the words "privates," "non-commissioned officers" as a misdescription, we reconcile the two sections and avoid doubt as to their meaning; otherwise they can not be harmonized.

This court has, in *United States* v. *Bowen* (100 U. S., 508), indicated the principle which governs the case, if there be doubt or ambiguity, viz; that "the old law is a valuable source of information" as to the meaning of the language "used in the revision." With this authority to examine the old law we can easily account for the appearance of the words "non-commissioned officers, musicians, or privates" in section 1613. We shall find that they were inadvertently introduced from a clause of an antecedent law, which had no relation to the subject of this section. The effect to be given this interpolated phraseology is stated by Spencer J. in *Taylor* v. *Delancy*, 2 Cai. (N. Y.) Cas., 149, in discussing the State revision of 1801, as follows:

> When the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change in the law, unless such phraseology evidently purports an intention in the legislature to work a change.

This rule was approved and adopted by Kent, one of the revisers of 1801, in *Yate's Case* (4 Johns., N. Y., 317.) The Attorney-General referred to this rule in his argument in *United States* v. *Bowen* (*supra*) as having received the indorsement of all the courts which considered the question. He cited, in support of his contention, *Burnham* v. *Stevens*, 33 N. H., 247; *Ash* v. *Ash*, 9 Ohio St., 383; *Conger* v. *Barker*, 11 *ib.*, 1; *Crosswell* v. *Crane*, 7 Barb (N. Y.), 191; *Ennis* v. *Crump*, 6 Tex., 34; *Pimmick* v. *Michael*, 4 Sandf. (N. Y.), 374; *Goodell* v. *Jackson*, 20 Johns (N. Y.), 722; *Therial* v. *Hart*, 2 Hill (N. Y.), 380; *Hoffman* v. *Delihanty*, 13 Alb. (N. Y.), Pr., 388; *In re* Brown, 21 Wend. (N. Y., 316; *Allen* v. *Ramsey*, 6 Metc. (Mass.), 635.

At the time the revisers were compiling the Revised Statutes, the act for the better organization of the Marine Corps, approved on July 25, 1861, as incorporated by them into section 1596, had been in force about twelve years. If prior to July 25, 1861, there was any law or regulation or custom which created or recognized a band for the Marine Corps and permitted it to be composed of non-commissioned officers, musicians, and privates, such law, regulation, or custom was then repealed, because of the provision in the act which prescribed "thirty musicians for [a] band." We have already found, by examining the laws in relation to the Marine Corps in force prior to 1861, that there was no express statutory authority for a Marine Band as a distinct corps or organization within the Marine Corps. Not until July 25, 1861, do we find such authority. Prior to that time there was a band in the Marine Corps; and it would seem to have been com-

posed of marines, who were non-commissioned officers, musicians, or privates detailed to play in it by the voluntary action of the commanding officer or other marine officer, presumably with the approval of the superior auauthorities. Congress also seems to have recognized its existence by making appropriations for musical instruments, and especially in the act of August 18, 1856, by allowing its members $4 per month, as additional pay for playing in the Capitol Grounds and President's Grounds (11 Stats., 118).

Prior to the reorganizing act of 1861 the law made no other provisions for a band in the Marine Corps. Up to that time the only "musicians" in the Marine Corps known to the law were "drummers and fifers." After the reorganization of 1861 we find two classes of marine musicians, viz, "thirty musicians for [a] band, sixty drummers, sixty fifers * * *."

Section 1613 of the Revised Statutes was compiled in part from the act of 1856 above mentioned. Another part of it was compiled from a clause in section one of the appropriation act for the naval service, approved August 5, 1854. This clause, as we have seen, had relation only to the pay of marines. It placed the non-commissioned officers, musicians, and privates of the Marine Corps of the United States on an equal footing as to pay and bounty upon re-enlisting, with the non-commissioned officers, musicians, and privates in the infantry of the Army (10 Stat. L., 583, 586). It made no mention of the band whatever. Here we find the error of the compilers. This clause had most clearly no relation whatever to the subject of section 1613 of the Revised Statutes. It had al-

ready been incorporated into section 1612, where it properly belongs. If we should strike out this inadvertence of the compilers there would be no doubt as to the meaning of section 1613, and no conflict between it and section 1596; for then section 1613 would contain no mention of "non-commissioned officers" or "privates." The original law of 1856 allowed the extra pay to the marines in the service of the United States who composed the voluntary corps of musicians then known as the Marine Band. It made no mention of non-commissioned officers or privates.

The accounting officers of the Department of the Treasury have always construed section 1613 in the light of section 1596, and before the revision of the statutes they construed section five of the act of 1856 as being controlled by the reorganizing act of July 25, 1861; hence they never since 1861 allowed the extra pay to any marine who performed with the band on the Capitol Grounds and President's Grounds, unless he was one of the rated corps of musicians created by the reorganizing act. This executive construction of the law has the sanction of the principle admitted by this court in *United States* v. *Bowen* (*supra*). It is the only exposition by which we can reconcile the apparent ambiguity in the language of section 1613.

This contemporaneous exposition of the law by officers who were required to construe and apply its provisions, receiving as it did the sanction not only of the officers of the Marine Corps and heads of Departments, but of Congress itself for more than a quarter of a century, gives no small support to our contention that the court below erred

in their opinion and decree. It is needless to cite many authorities on this point, as the decisions of the court upon it are very emphatic. (*United States* v. *Philbrick*, 120 U. S., 52; *United States* v. *Hill*, *ib.*, 169.)

After the reorganization of the Marine Corps in 1861 and up to the time Congress enacted the Revised Statutes no question like the one presented here could have arisen, for clearly during that period the laws in force allowed the extra pay only to the "musicians" of the band and their leader, or "principal musician." The commandant of the Marine Corps held to this view of the law in 1877, as we have already seen. If the claim for extra pay had been made by a drummer or fifer we might have some doubt as to his status. But as to the present claim we have no doubt. If this court should have any doubt as to its illegality, they must apply the principle recognized by themselves, and act upon the rule stated by Spencer, J. (*supra*), and adopted by Kent and all the courts in such cases.

In the case of *Viterbo* v. *Friedlander* (120 U. S. R., 707, 721, 726) we find this court citing with approval the rule that a statute must be construed with reference to its object, to the legislation and system of which it forms a part, in order to ascertain its true meaning and intent; "and," said Mr. Justice Gray, quoting the words of Eustice, C. J., of Louisiana, and citing many authorities in the opinion, "if its purpose and well-understood object are inconsistent with the precise words of a part, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole." In this very case the court examined a foreign code and a foreign language

to ascertain the meaning and effect of words in the code of Louisiana; so we may well look to the former statutes for the Marine Corps in the present instance.

There is but one controlling question before the court, viz: Was the interpolated phraseology of section 1613 intended by Congress to modify or work a change in section 1596?

Section 1596 of the Revised Statutes supplies us with a most emphatic answer in the negative. Contemporaneous exposition and legislative action both maintain the limitation of musicians for a band therein made. If Congress had intended to allow the marine officers, or their superiors in authority, discretionary powers to enlarge the Marine Band by adding to that corps privates or non-commissioned officers *ad libitum*, the enumeration of "thirty musicians" for a band would not have been retained in that section. (*Montgomery's Case*, 5 C. Cls. R., 92.)

No matter of how long standing may have been the practice of detailing privates or non-commissioned officers to perform in the Marine Band, it cannot be sustained against the express limitation of the law to a membership composed wholly of rated musicians. Especially is this the case when now, for the first time in the history of the Marine Corps since its reorganization in 1861, this practice is set up as the foundation of a claim for the extra pay which is allowed only to the statutory musicians of the band. The fact that this is the first claim of this character gives much strength to the construction heretofore placed on the statutes by the proper authorities of the Navy and Treasury Departments. (*United States* v. *Gra-*

ham, 110 U. S., 219; *United States* v. *Temple*, 105 U. S., 97.)

We have discussed the antecedent laws affecting the status of the Marine Band only for the purpose of having them in view as in *pari materia*. But we do not consider that there will be any necessity to resort to them for exposition. It is a rule that a statute needs no interpretation or construction when its language is clear and leads to no absurd conclusion. (*Ruggles* v. *Illinois*, 108 U. S. R., 526.) It is also a rule that the whole statute, and not a mere clause of a section standing by itself, is the best interpreter of the will of the legislature. When the language of any part of a statute is not clear, or when it leads to an absurd conclusion, interpretation may be resorted to in order to ascertain the intention of the legislature. This intention is not to be collected from any particular expression, but from a general view of the whole act (*per* Best, C. J., 4 Bing., 196.)

> The judges are to look at the whole act, and if they find in any particular clause an expression not so large or general in its import as those used in other parts of the act, and upon a view of the whole act they can collect from the more large or extensive expressions used in other parts the real intention of the legislature, it is their duty to give effect to the larger expressions (*per* Lord Tenterden, 7 B. and C., 643; Potter's Dwarris, Stat. and Const., p. 194).

Hence clauses may be controlled by clauses; hence if the same words occur in different parts of the statute they must be taken to have been everywhere used in the same sense, unless the contrary is clearly intended. In these

principles we find ample authority to read every part, section, clause, and word of Chapter IX, Title XV of the Revised Statutes, which is expressly devoted to the Marine Corps. We thus collate from the larger and more extensive expressions in its first section (1596) that the intention of Congress was to create a band composed of and graded as musicians, by which grade they are distinguished from the other enlisted marines provided for therein; hence the lesser expression in section 1613 is controlled by the more extensive one of the governing section. The creating clause of section 1596, by express words, legalized and put upon permanent footing a band which only subsisted before by questionable modes, or, at best, by the side wind of appropriation acts. This was the mischief felt—the necessity of the law, and the object of the remedy in view. What words could be more explicit for this object, or more effective as a remedy, than those used in that section, "thirty musicians for a band?" As to these words, they contain their own exposition. They control the less extensive words of section 1613. They admit of no construction, require no interpretation. The section permits no enlargement of the number of musicians, privates, non-commissioned officers, or commissioned officers. Lord Coke says: "The good expositor makes every sentence have its operation;" but for what purpose? What is his answer? It is this: "To suppress all the mischiefs." It is for this purpose, then, the good expositor "gives effect to every word of the statute; he does not construe it so that anything should be vain or superfluous, *nor yet against express words*, for *viperina est*

expositio quæ corrodit viscera textus; but so expounds it that one part of the act may agree with the other and all may stand together." (*Bonham's Case*, 8 Rep., 117.) When exposition is necessary there is a cardinal rule, namely: The intention of the legislature is to be taken or presumed according to what is consonant to reason or good discretion. This rule was laid down by Plowden, pp. 10, 57, 205, 263, and by it, says Chancellor Kent, "the sages of the law have ever been guided in seeking for the intention of the legislature." (1 Kent Com., 462.)

If we interpret section 1613 as meaning that "the corps of musicians known as the Marine Band" may be composed of privates and non-commissioned officers as well as musicians, would such exposition tend to suppress the mischief for which the legislature supplied a remedy in section 1596? Would not such exposition tend to make vain the remedy? Would not it be contrary to the express words of the controlling section? Would not it be inconsistent with reason and good discretion?

If we interpret section 1613 as meaning that "the Secretary of the Navy or other superior officer" may order non-commissioned officers or privates of the Marine Corps to perform with the Marine Band on the Capitol Grounds or President's Grounds, would that be good exposition? The whole statute intends that these marines shall be trained as soldiers, and not as non-combatants; that they shall be at their proper posts of duty, under their proper officers and non-commissioned officers, ready for military service. Clearly such exposition would create a serious mischief against good order and military discipline. It would not be consonant to reason or good discretion to im-

ply that such intention existed in the mind of the legislature. It would be to revive the improper practice which was abolished by the act of July 25, 1861, when the Marine Corps was established on its present footing. It would be to impose a liability upon the Government contrary to the heretofore unquestioned exposition of the law as administered in the executive branch and understood in the legislature for more than a quarter of a century.

We submit that there is nothing in the words of section 1613 to justify a departure from such long standing precedents.

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Assistant Attorney.

In the Supreme Court of the U. S.

OCTOBER TERM, 1887.

THE UNITED STATES, *Appellant*,
vs.
JOHN BOND, *Apellee*. } No. 657.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF.

The appellee enlisted in the United States Marine Corps, at the Marine Barracks, Washington, D. C., October 29, 1879, as a private; was immediately attached to the band, in which he performed until May, 1881, when he was formally rated as a musician. Meanwhile he had played on the Capitol and White House grounds whenever ordered, but as he has been allowed no extra compensation for this service, he seeks to recover it in this action.

Section 1596 describes the organization of the Marine Corps as consisting of a certain number of officers, non-commissioned officers, and privates, together with a drum major, a principal musician, thirty musicians, sixty drummers, sixty fifers, while section 1613 directs that when the band is ordered to play on the Capitol or White House grounds extra compensation shall be given.

While the Marine Corps was established in in 1775, and its band is one of the best known organizations of the

character in the country, curiously this band has never had formal statutory recognition. Drums and fifes were provided for the Navy as long ago as 1790 (1 Stat. L., p. 350), while in 1798 "musicians" then understood to mean drummers and fifers, were given to the Marine Corps (1 Stat. L., p. 595) Other provisions similar in character have been made from time to time, but no mention is made of a musical organization until the enactment of the laws now condensed in section 1613 of the Revised Statutes. That section reads as follows:

The marines who compose the corps of musicians known as the "Marine Band" shall be entitled to receive at the rate of four dollars a month each, in addition to their pay as non-commissioned officers, musicians, or privates of the Marine Corps, so long as they shall perform, by order of the Secretary of the Navy or other superior officer, on the Capitol grounds or the President's grounds.

The statute does not say that the members of the Marine Band shall receive extra compensation, for no such band is known to the law; but the pay is given to those marines who compose the corps of musicians known as the "Marine Band." The only other provision looking even indirectly to a musical organization is that of section 1596, allowing a drum major, a principal musician, thirty musicians, sixty drummers and sixty fifers. If the extra pay had been intended for them only, what more easy than for Congress to have said so. But the phraseology of section 1613 is extremely peculiar. It is marked by a desire to do something more than this, and seems to recognize the fact that marines other than those rated as musicians performed in the band. It says, not the musicians, but the "marines who compose the organization known as the 'Marine Band,'" are to receive additional compensation; and this

compensation is to be additional, not to their pay as a drum major, or as a principal musician, or as musicians, but to the pay they receive, either as non-commissioned officers, or as musicians, or as privates of the Marine Corps. The appellee was a "private of the Marine Corps." He was one of the marines who composed the organization known as the "Marine Band." He performed on the Capitol grounds and on the President's grounds, under proper orders, and thus falling within the phraseology of the statute, he should have received the additional pay.

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